

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 16, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Oregon Grain Growers Brand Distillery Inc.

v.

Michael Pitsokos

—
Cancellation No. 92076817

—
Kevin Haynie of Yourtrademarkattorney.com for
Oregon Grain Growers Brand Distillery Inc.

Michael Pitsokos, Pro Se.

—
Before Goodman, Pologeorgis, and Lebow,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Michael Pitsokos (“Respondent”) owns a registration on the Principal Register for the mark TORPEDO JUICE (in standard characters), identifying “Alcoholic beverages, except beer; Gin; Liquor; Rum” in International Class 33.¹

Oregon Grain Growers Brand Distillery Inc. (“Petitioner”) seeks to cancel the involved registration on the ground of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on its prior common law use of TORPEDO

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¹ Registration No. 6274024 issued on February 6, 2021, and filed on January 11, 2020.

JUICE in connection with “alcoholic beverages and liquor.”² Petitioner alleges ownership of application Serial no. 90615007 for the mark TORPEDO JUICE for “Alcoholic beverages, except beer; liquor; spirits” in International Class 33.³ Petitioner also alleges that Respondent did not make use in commerce of the involved mark prior to the expiration of the time period in which to file his statement of use while the underlying application was still pending.⁴

In its amended answer, Respondent denies the salient allegations in the petition to cancel and asserts affirmative defenses related to priority.⁵

² Amended petition to cancel, 13 TTABVUE. The exhibits attached to the amended petition to cancel are not in evidence unless submitted during the trial period. Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c). Petitioner’s witness introduced the cease and desist letter which is attached as exhibit B to the petition to cancel during his testimony. Bullington deposition, exhibit 17, 25 TTABVUE 203-204.

³ *Id.*

⁴ *Id.*

⁵ Amended Answer, 18 TTABVUE.

Respondent included a reservation of rights to assert further affirmative defenses, which is improper. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *6 (TTAB 2022) (reservation of rights to add affirmative defenses is improper under the federal rules because it does not give fair notice of the affirmative defense).

Respondent also alleges “failure to state a claim” in his amended answer which is not a true affirmative defense because it relates to an assertion of the insufficiency of the pleading of Petitioner’s claim rather than a statement of a defense to a properly pleaded claim. This “defense” has been waived because it was not pursued. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *3 n.5 (TTAB 2022).

Respondent’s fourth affirmative defense alleges that Petitioner does not have priority over Respondent. 18 TTABVUE. Although not explicitly pled, we view this defense to include the allegation that TORPEDO JUICE is not distinctive such that Petitioner does not have priority of acquired distinctiveness. The descriptiveness of TORPEDO JUICE was addressed by Respondent in its brief on the merits, 35 TTABVUE 4, and we find that that in connection with Petitioner’s common law use, the issue of whether TORPEDO JUICE is distinctive was tried by implied consent under Fed. R. Civ. P. 15(b)(2). See *Renaissance Rialto Inc. v. Ky Boyd*, 107 USPQ2d 1083, 1084 n.3 (TTAB 2013) (although lack of acquired distinctiveness was not specifically pleaded in connection with the descriptiveness claim, the Board viewed the descriptiveness claim as including the allegation of lack of acquired distinctiveness,

Each party filed a trial brief and Petitioner filed a reply brief.⁶

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the involved registration. In addition, the parties introduced the following testimony and evidence.

Petitioner submitted a notice of reliance on Respondent's interrogatory responses, which were signed by Respondent's prior counsel but not Respondent.⁷ Petitioner also submitted the deposition testimony of Rodney Bullington, owner and President of Petitioner.⁸

Respondent submitted a notice of reliance which consisted of an affidavit and exhibits, not accompanied by a certificate of service⁹; Petitioner moved to strike it.¹⁰ The Board granted Petitioner's motion as conceded.¹¹ Respondent then filed an amended notice of reliance,¹² which consisted of the same affidavit and exhibits, with

finding the issue had been tried by implied consent); *see also Threshold.TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031, 1037 (TTAB 2010) (considering distinctiveness of BLACKBELT TV in connection with prior use because the parties argued descriptiveness in their briefs).

⁶ References to the briefs and the record refer to the Board's TTABVUE docket system. Petitioner's brief is at 34 TTABVUE and its reply brief is at 36 TTABVUE. Respondent's brief is at 35 TTABVUE.

⁷ 24 TTABVUE. See Fed. R. Civ. P. 33(b)(3), (b)(5) (each interrogatory must be answered "fully in writing under oath" and "[t]he person who makes the answers must sign them, and the attorney who objects must sign any objections").

⁸ 25 TTABVUE.

⁹ 26 TTABVUE.

¹⁰ 27 TTABVUE.

¹¹ 29 TTABVUE.

¹² 30 TTABVUE.

a certificate of service; Petitioner moved to strike the amended notice of reliance.¹³ The Board also granted this motion as conceded.¹⁴

Therefore, Respondent has no testimony or evidence that is of record. However, this does not result in a concession of the case because Respondent is not required to take testimony or evidence. *See Yazhong Investing Ltd. v. MultiMedia Tech. Ventures, Ltd.*, 126 USPQ2d 1526, 1531 n.13 (TTAB 2018) (“Because Respondent, as defendant herein, is under no obligation to submit evidence or a brief, we do not construe Respondent’s failure to do so as a concession of the case.”).

It is Petitioner’s burden to establish its likelihood of confusion and nonuse claims by a preponderance of the evidence. *Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989) (citing cases involving likelihood of confusion); *U.S. Shoe Corp. v. J. Riggs West, Inc.*, 221 USPQ 1020, 1022 (TTAB 1984) (the burden is on plaintiff to establish nonuse in commerce by a preponderance of the evidence).

II. Entitlement to a Statutory Cause of Action

In every inter partes case, the plaintiff must establish its statutory entitlement to bring an opposition or cancellation proceeding. To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 112777, at *4 (Fed. Cir. 2020).

¹³ 31 TTABVUE.

¹⁴ 33 TTABVUE.

Demonstrating a real interest in seeking cancellation of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark demonstrates damage proximately caused by registration of the mark. *Id.* at *7-8.

Petitioner's witness testified that Petitioner is a small craft distillery that manufactures alcohol and sells it through its tasting room and restaurant in Pendleton, Oregon.¹⁵ Petitioner sells a pineapple vodka named TORPEDO JUICE.¹⁶ This testimony establishes that Petitioner is a competitor of Respondent with a direct commercial interest, establishing its entitlement to a statutory cause of action. *See Books on Tape Inc. v. The Booktape Corp.*, 836 F.2d 519, 5 USPQ2d 1301, 1302 (Fed. Cir. 1987) (petitioner, as a competitor of respondent, "clearly has an interest in the outcome beyond that of the public in general and has [statutory entitlement to seek cancellation]"). *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) ("A belief in likely damage can be shown by establishing a direct commercial interest.").

III. Priority

To establish priority on a likelihood of confusion claim brought under Section 2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States...and not abandoned." Trademark Act, 15 U.S.C. § 1052(d).

¹⁵ Bullington deposition, 25 TTABVUE 9.

¹⁶ Bullington deposition, 25 TTABVUE 9.

Priority may arise from “a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *See Herbko Int’l v. Kappa Books*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *see also Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (a party may establish its own prior proprietary rights in a mark through actual use, use analogous to trademark use, or an earlier constructive use date accorded to the party’s own application).

Section 2(d) only requires prior use; it does not require use in commerce. Accordingly, a petitioner claiming priority may rely on intrastate use. *See National Cable Television Association Inc. v. American Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1429 n.4 (Fed. Cir. 1991); *see also L. & J.G. Stickley Inc. v. Cosser*, 81 USPQ2d 1956, 1965 (TTAB 2007) (intrastate use of petitioner’s mark is sufficient to establish priority). Therefore, Respondent’s affirmative defenses relating to Petitioner not having priority because of intrastate use of TORPEDO JUICE in connection with alcoholic beverages must fail.

As noted above, Petitioner seeks to rely on common law rights in its mark TORPEDO JUICE. In order for a plaintiff to prevail on a claim of likelihood of confusion based on its ownership of common-law rights in a mark, the mark must be distinctive, inherently or otherwise, and plaintiff must show priority of use. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981); *see*

also Towers v. Advent Software, Inc., 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990) (rule of *Otto Roth* applicable to cancellation proceedings).

Therefore, our evaluation of Petitioner's proprietary rights begins with the distinctiveness of Petitioner's mark. A designation asserted as a mark is not inherently distinctive if it is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1). As indicated in note 5 *supra*, Respondent argues in its brief that TORPEDO JUICE is a merely descriptive designation.¹⁷

Thus, we consider whether the term TORPEDO JUICE is merely descriptive of Petitioner's goods, and, if so, whether Petitioner has established that TORPEDO JUICE has acquired distinctiveness prior to Respondent's constructive use date.¹⁸ *See China Healthways Inst., Inc. v. Xiaoming Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1124 (Fed. Cir. 2007) (absent evidence of actual use, applicant "was accorded constructive use as of the application filing date"); *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *35 n.52 ("As to any marks that are not inherently distinctive, Opposer must establish that the designations acquired distinctiveness prior to Applicant's constructive use date" (citing *Perma Ceram Enters. Inc. v. Preco. Indus. Ltd.*, 23 USPQ2d 1134, 1136 (TTAB 1992) ("where the mark relied upon by a plaintiff in support of its priority of use and likelihood of confusion claim is merely descriptive ... then the plaintiff must establish priority of

¹⁷ 35 TTABVUE 4.

¹⁸ Although Respondent argues in his brief use analogous to trademark use prior to its application filing date, 35 TTABVUE 4, as indicated above, there is no evidence in the record to support such use because Respondent's evidence and testimony has been stricken.

acquired distinctiveness”)); *Threshold.TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d at 1037 (considering distinctiveness of BLACKBELT TV and whether priority of acquired distinctiveness was established prior to applicant’s application filing date).

A term is merely descriptive “if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 1217 (Fed. Cir. 1987)). Descriptiveness must be evaluated “in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *Id.*

Petitioner’s witness testified about its pineapple flavored vodka:

Q. And who came up with the name Torpedo Juice?

A. It was my idea to use it, to name the product Torpedo Juice.

Q. And what is the origin of the name Torpedo Juice?

A. It’s a historical reference from World War II when sailors would, basically, skim ethanol from torpedos and tried it with pineapple juice and they affectionally called it Torpedo Juice.¹⁹

Petitioner’s witness discussed its “release menu” for its pineapple flavored vodka with the designation TORPEDO JUICE which includes cocktails incorporating TORPEDO JUICE; the release menu also provides information as to the history of

¹⁹ Bullington deposition, 25 TTABVUE 9-10.

TORPEDO JUICE, stating “over time the concoction of re-distilled, filtered 180 proof alcohol mixed with pineapples was dubbed ‘TORPEDO JUICE.’”²⁰ The release menu is shown below.



In addition, the record includes many photographs of the bottle labels for TORPEDO JUICE showing on its face 100 proof pineapple flavored vodka with a drawing of a torpedo, shown below²¹:

²⁰ Bullington deposition, 25 TTABVUE 19-20, exhibit 4, 25 TTABVUE 70.

²¹ Bullington deposition, 25 TTABVUE 24-25 and exhibit 9, 25 TTABVUE 75.



A Facebook post, excerpt shown below, provided in connection with witness testimony states “100 Proof Pineapple Flavored Vodka just like the guys in the Navy made during WWII in the pacific.”²²

²² Bullington deposition, 25 TTABVUE 17-18 and exhibit 3, 25 TTABVUE 69.



“Torpedo Juice” is “slang” for “Intoxicating liquor extracted from torpedo fuel; any strong home-made alcoholic liquor²³ or an “extremely strong home-distilled liquor”²⁴; “extremely strong, home-distilled liquor”²⁵; and “a drink based on the fuel alcohol of naval torpedoes.”²⁶ See *Threshold.TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d at 1037 (taking judicial notice of dictionary definitions of “blackbelt” and “tv” in connection with distinctiveness inquiry for common law priority).

We find that TORPEDO JUICE as used in connection with Petitioner’s pineapple vodka, informs purchasers that Petitioner’s goods are an alcoholic beverage that is high proof, mixed with pineapple, and based on the beverage that originated from naval sailors during World War II. We find that TORPEDO JUICE merely describes

²³ The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format or that have regular fixed editions. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

²⁴ OXFORD DICTIONARY, www.oed.com, accessed October 10, 2023); GREEN’S DICTIONARY OF SLANG greensdictofslang.com/ (accessed October 10, 2023).

²⁵ GREEN’S DICTIONARY OF SLANG <https://greensdictofslang.com/> (accessed October 10, 2023).

²⁶ MERRIAM-WEBSTER DICTIONARY, www.merriamwebster.com/dictionary (accessed October 10, 2023).

a feature of Petitioner's goods and is not inherently distinctive for Petitioner's pineapple flavored vodka. It is therefore Petitioner's burden to demonstrate that its designation TORPEDO JUICE acquired distinctiveness prior to the January 11, 2020 filing date of Respondent's application, which we find is Respondent's priority date. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *35 n.52.

We now turn to the evidence that Petitioner introduced into the record, which bears on whether Petitioner has established priority of acquired distinctiveness.

Acquired distinctiveness is generally understood to mean an acquired "mental association in buyers' minds between the alleged mark and a single source of the product." *RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1814 (TTAB 2018) (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (5th ed., September 2017 Update)).

The considerations to be assessed in determining acquired distinctiveness "can be described by the following six factors: (1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark." ("Converse factors"). *In re SnoWizard, Inc.*, 129 USPQ2d 1001, 1005 (TTAB 2018) (quoting *Converse, Inc. v. Int'l Trade Comm'n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)). "[N]o single factor is determinative" and we consider the evidence as a whole. *Shenzhen IVPS*

Tech. Co. Ltd. v. Fancy Pants Prods., LLC, 2022 USPQ2d 1035, at *33 (citations omitted). We need only consider those *Converse* factors for which we have evidence. In this case, Petitioner’s witness testimony and accompanying exhibits addressed length of use, amount of sales, manner of advertising, and unsolicited mentions by third-parties.

Petitioner’s witness indicates first use of the TORPEDO JUICE designation in connection with pineapple flavored vodka in early November 2019 in Pendleton, Oregon, U.S.²⁷ Petitioner’s witness provided sales reports from November 8, 2019 through January 2022 for the TORPEDO JUICE labeled goods.²⁸ Petitioner sold 162 bottles (\$4880.70) between November 8 through November 15, 2019; 82 bottles (\$2291.90) between December 1, through December 31, 2019; and 40 bottles (\$1118.00) between January 1 through January 31, 2020.²⁹

Petitioner’s witness also testified that “their main marketing is through social media,” using Facebook, Instagram, Google Business, TikTok and Snapchat.³⁰ Petitioner’s witness testified about its Facebook social media posts prior to and subsequent to its first use of the designation TORPEDO JUICE (November 6,

²⁷ Bullington deposition, 25 TTABVUE 19.

²⁸ Bullington deposition, 25 TTABVUE 43-51 and exhibit 16, 25 TTABVUE 176-202.

²⁹ Bullington deposition, 25 TTABVUE 43-45 and exhibit 16, 176-178. These documents do not include specific dates for the goods sold but give the total amounts by month, so we do not have specific sales figures for the period from January 1, 2020 through January 10, 2020, prior to Respondent’s January 11, 2020 constructive use date. Petitioner’s witness did provide some receipts as exhibits for the time periods between November 2019 and January 10, 2020 with his testimony.

³⁰ Bullington deposition 25 TTABVUE 14.

November 7, and November 9, 2019 (two posts)).³¹ Petitioner's witness also identified a Facebook event post for the release party to which 56 people responded,³² a November 9, 2019 Facebook post by the mother of one of Petitioner's owners,³³ and a November 10, 2019 third-party blog post.³⁴ Petitioner's witness also testified about single social media posts subsequent to Respondent's January 11, 2020 constructive use date from February 2020 through June 2020, with two posts authored by third-parties during this period.³⁵

From this testimony and evidence we find that Petitioner's use of the designation TORPEDO JUICE was for a short period of time (approximately three months use prior to Respondent's constructive use date) and its small sales figures cannot be said to have made a substantial impact either in the alcohol market as a whole, or in the vodka category particularly, especially in light of the fact that Petitioner is a small grain distillery whose sales are limited to the state of Oregon.

In any event, mere sales alone, do not suffice to establish acquired distinctiveness in and of themselves, and diminished sales indicate less exposure in the marketplace. During the period prior to Respondent's constructive use date, the sales figures provided by Petitioner's witness show monthly decreases by nearly half the sales volume between November through January 2020 (162 bottles in November 2019; 82

³¹ Bullington deposition, 25 TTABVUE 16-19 and exhibits 2-4, 6, 25 TTABVUE 21-22.

³² Bullington deposition, 25 TTABVUE 20-21 and exhibit 5, 25 TTABVUE 71.

³³ Bullington deposition, 25 TTABVUE 22-23 and exhibit 7, 25 TTABVUE 73.

³⁴ Bullington deposition, 25 TTABVUE 30-31 and exhibit 13, 25 TTABVUE 79-80.

³⁵ Bullington deposition, 25 TTABVUE 24-29 and exhibits 8-12, 25 TTABVUE 74-78. Exhibits 8 and 10 reflect third-party use.

bottles in December 2019; 40 bottles in January 2020). Moreover, the probative value of this testimony and evidence is diminished by the fact that the bottles sold and dollar amounts are raw numbers that lack context in the alcoholic beverage industry. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016) (probative value of sales revenue diminished because there was no context showing applicant's market share and whether the amount of doses sold were significant in the industry); *see also In re GJ & AM, LLC*, 2021 USPQ2d 617, at *44 (TTAB 2021) (in connection with acquired distinctiveness claim, "we cannot accurately gauge Applicant's level of success without additional evidence as to Applicant's market share or how COOKINPELLETS.COM ranks in terms of sales in the trade.").

In addition, Petitioner's social media advertising was limited to Facebook and consisted of a small number of posts in the month of November 2019, with some of the posts prior to actual use (release party). We also do not know the level of consumer exposure to these posts because there was no relevant witness testimony relating to the extent of consumer exposure to the Facebook platform (such as the number of followers, likes, or other analytics or metrics). *See In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ2d 345, 347 (CCPA 1975) ("The advertisements of record do not support an inference of distinctiveness inasmuch as the evidence fails to disclose information from which the number of people exposed to the [mark] could be estimated—such as circulation of the publications in which the advertisements appear, advertising expenditures, number of advertisements published"). As to the third-party blogpost, this one blogpost is insufficient to show widespread recognition

from the public. “[P]roof of *distinctiveness* requires more than proof of the existence of a relatively small number of people who associate” the asserted mark with the producer. *Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 132 USPQ 627, 633 (CCPA 1962) (emphasis in original).

In view of the foregoing, we find Petitioner has not established that its designation TORPEDO JUICE acquired distinctiveness prior to the January 11, 2020 application filing date of Respondent’s registration. Because Petitioner cannot establish priority of acquired distinctiveness, a necessary element of the ground of likelihood of confusion, the petition to cancel is denied as to Petitioner’s likelihood of confusion claim.

IV. Nonuse in Commerce

Under Section 45 of the Trademark Act, “use in commerce” for goods is defined as “the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” 15 U.S.C. § 1127. Section 45 of the Trademark Act states that a mark shall be deemed to be in use in commerce on goods when the mark is placed on the goods, or their containers or displays associated therewith, or on documents associated with the goods or their sale, and the goods are “sold or transported in commerce.” *Id.*

A registration that issues from an application based on an intent to use the mark in commerce under Section 1(b) of the Trademark Act is void ab initio if the mark was not in use in commerce in connection with the goods prior to the deadline for filing a statement of use or prior to the deadline for any insurance extension filed with the

statement of use. Section 1, 15 U.S.C. §§ 1051(d)(1) and 1051(d)(2); Trademark Rules 2.88(a)1)-(2), 37 C.F.R. §§ 2.88(a)(1), and 2.88(a)(2); *see Embarcadero Techs., Inc. v. Delphix Corp.*, 117 USPQ2d 1518, 1526 (TTAB 2016); *see also Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 90 USPQ2d 1301, 1305 (Fed. Cir. 2009) (“The registration of a mark that does not meet the use requirement is void ab initio.”).

To prevail on its claim of nonuse, Petitioner must prove that Respondent was not using the TORPEDO JUICE mark in commerce for the goods identified in Registration No. 6274024 as of the January 7, 2021 deadline for filing the statement of use.³⁶

To establish nonuse, Petitioner points to Respondent’s unverified interrogatory responses submitted under Petitioner’s notice of reliance,³⁷ which have only been signed by Respondent’s prior counsel. Petitioner argues that Respondent failed to produce any evidence of use and that its response to interrogatory request no. 2 is “the only probative evidence relating to the use of Registrant’s Mark.”³⁸ Petitioner submits that this is “an admission that his products were neither sold, nor transported, in commerce” and establishes nonuse.³⁹

³⁶ Respondent filed his statement of use on December 5, 2020 and did not file concurrently any extension of time to file his statement of use (insurance extension). *See* registration file for Registration No. 6274024.

³⁷ 24 TTABVUE.

³⁸ 34 TTABVUE 11-12. The interrogatory response states in part “Petitioner [sic] identifies the number zero of individuals and/or entities located in the US to which Registrant provided the products recited in Registration No. 6,274,024 under Registrant’s TORPEDO JUICE mark prior to January 8, 2021.” Petitioner’s notice of reliance, 24 TTABVUE 5.

³⁹ 34 TTABVUE 11. We note that our primary reviewing court considers interrogatory responses as evidential admissions. *See Tzu Wei Chen Food Co., Ltd., v. Chia-chi Enters.*,

In response, Respondent argues that the burden of proof is on Petitioner to prove nonuse and that Petitioner's claims of nonuse are false.⁴⁰ Respondent clarifies in its brief that the interrogatory response no. 2 of "zero" was a reference to public sales, but argues that based on the three-tier system under U.S. liquor laws, it has other activities, such as transportation of the TORPEDO JUICE labeled goods that show use in commerce.⁴¹

As indicated above, interrogatory no. 2 which Petitioner relies on for the nonuse claim is not signed under oath by Respondent as required by Fed.R.Civ.P. 33(b)(1)(B), (3) and (5), and Petitioner never moved to compel a proper verification.

Under Rule 33, answers to interrogatories must be verified and must be signed by the person answering the interrogatory, not only by the party's attorney. "It has been stated that unsigned and unverified answers to interrogatories do not qualify as answers under Fed. R. Civ. P. 33." *Cabales v. U.S.*, 51 F.R.D. 498, 499 (S.D.N.Y. 1970), *aff'd*, 447 F.2d 1358 (2d Cir. 1971). Respondent's interrogatories signed by prior counsel are simply "an *unverified* statement made by his counsel" and are not in accordance with Fed.R.Civ.P. 33(b)(1)(A) which requires interrogatories to be

Inc., 73 F.3d 379, 38 USPQ2d 1932, 1935-37 (Fed. Cir. 1995) (table decision) (finding evidence insufficient to establish priority, noting lack of direct evidence and that interrogatory responses are not treated as conclusive admissions but evidential admissions by the courts, which entitles them to less than conclusive weight to support an inference of prior use).

⁴⁰ 35 TTABVUE 3.

⁴¹ 35 TTABVUE 3. We point out that much of Respondent's argument is based on evidence stricken from the record. Petitioner requests that we "disregard any and all factual allegations in Registrant's trial brief." 36 TTABVUE 2. Because contentions in Respondent's brief based on argument do not substitute for evidence, we do not consider them. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *47 n.68 (citing *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018)).

answered “by the party to whom they are directed.” (emphasis in original). *U.S. v. \$39,557.00 More or Less, in U.S. Currency*, F. Supp.2d 335, 340 (D.N.J. 2010). See also *Hindmon v. Natl.-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 619 (7th Cir.1982) (observing that interrogatory answers signed by the attorney and not the party violated “the clear mandate of Federal Rule of Civil Procedure 33(a)”).

Courts have found that unsigned and unsworn interrogatories by the person to whom they are directed are not competent evidence. See Fed.R.Civ.P. 33(c); *Daniel J. Quirk, Inc. v. Village Car Co.*, 120 USPQ2d 1146, 1151 n.28 (TTAB 2016) (citing cases that unsigned and unverified answers to interrogatories are not competent evidence or are not a valid basis for factual findings in connection with a motion for summary judgment).

We find that Respondent’s unverified interrogatory no. 2 is not competent evidence of nonuse. Inasmuch as Petitioner references unverified interrogatory no.2 as the only “probative evidence” of Respondent’s nonuse in the record, Petitioner has not met its burden to show nonuse by a preponderance of the evidence.

Therefore, the petition to cancel is denied as to Petitioner’s nonuse claim.

Decision: The petition to cancel is denied in its entirety.